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ORIGINAL

CONVENTION PROVIDING A UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

THE CONVENTION PROVIDING A UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL, ADOPTED AT A DIPLOMATIC CONFERENCE HELD IN WASHINGTON, D.C. FROM OCTOBER 16 to 26, 1973, AND SIGNED ON BEHALF OF THE UNITED STATES ON OCTOBER 27, 1973

JULY 15, 1986.—Convention was read the first time, and together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for the use of the Senate

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LETTER OF TRANSMITTAL

THE WHITE HOUSE, *July 2, 1986.*

To the Senate of the United States:

I transmit herewith, for the advice and consent of the Senate to ratification, the Convention Providing a Uniform Law on the Form of an International Will. I also transmit for the information of the Senate the report of the Department of State with respect to this Convention.

The purpose of the Convention is to enable testators to make wills in a form that will be self-proving in all countries where the Convention is in force. The Convention does not abolish or modify existing laws on testamentary succession, nor does it attempt to unify the formal requirements for executing a will that already exist in the various systems of national law. Rather, it provides, alongside and in addition to the traditional forms, another new form that testators may use—the "international will."

With the increasing mobility of persons and goods, there has been a growing awareness of the need for a form of will that will be widely accepted, regardless of where the testator may be domiciled or residing or where his property may be located at the time of his death. American probate law experts participated actively in the preparatory studies for the Convention, which was adopted at a diplomatic conference hosted by the United States at Washington in 1973. Ratification of the Convention by the United States has been recommended by the American College of Probate Counsel and the American Bar Association, as well as by the Secretary of State's Advisory Committee on Private International Law, on which leading national legal organizations are represented.

Countries ratifying or acceding to the Convention are required to introduce into their domestic law the rules regarding an international will that are set forth in an annex to the Convention. To give full effect to the Convention in the United States, implementing legislation will be required at the Federal level. Legislation will also be required in those States of the United States that wish to make it possible for testators to execute international wills in their jurisdiction. The distinctions between the two types of legislation are described in the accompanying report from the Department of State. As noted in that report, four States have already adopted the Uniform International Wills Act, in anticipation of United States ratification of the Convention, and it is expected that many more States will do so once ratification is assured. The United States instrument of ratification of the Convention will be deposited only after the necessary Federal legislation is enacted.

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I recommend that the Senate give early and favorable consideration to the Convention and give its advice and consent to ratification.

RONALD REAGAN.

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LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
Washington, June 4, 1986.

The PRESIDENT,
The White House.

THE PRESIDENT: I have the honor to submit to you, with a view to its transmittal to the Senate for advice and consent to ratification, the Convention Providing a Uniform Law on the Form of an International Will. The Convention was adopted at a diplomatic conference held in Washington, D.C., from October 16 to 26, 1973, and was signed on behalf of the United States on October 27, 1973. It entered into force on February 9, 1978, six months after the date of deposit of the fifth instrument of ratification or accession.

The purpose of the Convention Providing a Uniform Law on the Form of an International Will is neither to abolish or modify existing laws on testamentary succession nor to harmonize or unify the formal requirements for executing a will that already exist in the various systems of national law. Rather, the Convention simply provides, alongside and in addition to the traditional forms, another new form which testators may use--the "international will".

The tremendous increase in the mobility of persons and goods in recent decades has accentuated the need to give maximum assurance to the testator that his last wishes will be respected by enabling him to record those wishes in a form that will be widely accepted, regardless of where he may be domiciled or residing or where his movable or immovable property may be located at the time of his death. International efforts to promote that aim have a relatively long history. In 1961, the International Institute for the Unification of Private Law (UNIDROIT), an international organization located in Rome, convened a Working Committee to prepare a preliminary draft of a uniform law introducing a new form of will—the international will. After having been submitted for study and comment to the governments of member states of UNIDROIT, the preliminary draft was revised by a committee of governmental experts in 1971 and served as the basis for the work of the 1973 Washington diplomatic conference.

Having become a member state of UNIDROIT in 1964, the United States played an active role in this area of UNIDROIT's work in order to ensure that the resulting Convention would be of the greatest possible utility and benefit to American testators. The initiative of the United States Government in hosting the 1973 Washington conference stemmed from a realization that the American bar was quite supportive of cooperative efforts at state, national and international levels to reduce problems for testators that result from divergent laws concerning the form and proof of wills.

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For more than six years before the Washington conference the UNIDROIT proposal was the focus of preliminary study and discussion in the United States by advisory groups that included experts from the American Bar Association, the American College of Probate Counsel, and the National Conference of Commissioners on Uniform State Laws, as well as from the judiciary, the field of banking, and law schools. Since adoption of the final text of the Convention, support for its ratification by the United States has been expressed by the Secretary of State's Advisory Committee on Private International Law and by leading professional organizations including the American Bar Association and the American College of Probate Counsel.

Characteristics of an International Will

A will is identified as an international will by a certificate, attached to the will, which is executed in the form prescribed in the Convention by a person authorized to act in connection with international wills in the jurisdiction where the will is executed (the "authorized person"). This certificate states that the required formalities have been complied with in the execution of the will. The form of the certificate was adopted by the wills conference on the basis of an exhaustive comparative study of the law of many countries. It is similar in most respects to the forms of attestation used in American wills. There are some innovations derived from other legal systems, but nothing that will be bewildering or confusing for American lawyers or testators. The signatures on the will and the attached certificate need not be legalized or otherwise authenticated.

There are certain mandatory rules in the Convention and uniform law that must be observed to establish the formal validity of an international will. Failure to comply with any of these rules means that a will cannot be proved by use of the efficient procedures available with regard to international wills. However, a will that falls short of being an international will may well be valid and provable under other laws that are in effect independent of the legal regime for international wills.

These mandatory rules are as follows: (a) An international will must be in writing, but it may be in any language and it may be written by hand or by any other means. It need not be written by the testator himself. (b) The testator must declare in the presence of two witnesses and of a person authorized to act in connection with international wills that the document is his will and that he knows the contents thereof, but the testator need not inform the witnesses or the "authorized person" of the contents of the will. (c) The testator must sign the will or, if he has previously signed it, acknowledge his signature in the presence of the witnesses and of the authorized person. When the testator is unable to sign, the absence of his signature does not affect the validity of the international will if he indicates the reason for his inability to sign to the authorized person and that person makes note thereof on the will. (d) The witnesses and the authorized person must attest the will by signing in the presence of the testator.

In addition to these mandatory requirements for an international will, the uniform law contains a number of additional formali-

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ties which the authorized person has responsibility to observe, but which are not indispensable to the validity of an international will. These include the provisions that signatures are to be placed at the end of the will; that, if the will consists of several sheets, each sheet is to be signed by the testator and numbered; and that the date of the will is to be the date of its signature by the authorized person, who is to note the date at the end of the will. Moreover, the authorized person is to ask the testator whether he wishes to make a declaration concerning the safekeeping of his will. If so, and at the express request of the testator, the place where he intended to have his will kept is to be mentioned in the certificate which is attached to the will.

Form and Effect of the Convention and Implementing Legislation

Article I of the Convention requires each Contracting Party to introduce into its law the rules regarding the form of an international will. Those rules are set out in the uniform law, annexed to the Convention, which gives effect to the two key features of the Convention. One feature is to enable testators in jurisdictions where the Convention and uniform law are in force to make an international will. The other is to ensure the recognition of a properly executed international will in all Contracting States as a matter of local law; the uniform law provides that an international will shall be valid as regards form, "irrespective particularly of the place where it is made, of the location of the assets and of the nationality, domicile or residence of the testator."

While a convention that provides for a uniform law cannot work if every party state is able to change the law as it pleases, the Convention nevertheless allows certain legislative variations from jurisdiction to jurisdiction. Article I(3) of the Convention provides that each Contracting Party "may introduce into its law such further provisions as are necessary to give the provisions of the Annex full effect in its territory." Such additional provisions are necessary, in particular, to designate the persons who are authorized to act in connection with international wills (the "authorized person"); there may also be provisions on such matters as qualifications of witnesses and interpreters, and on registration or safekeeping of wills.

Use of the Federal-State Clause

The Convention includes the so-called federal-state clause which is customary in conventions of this nature. It provides in Article XIV that if a State has two or more territorial units in which different systems of law apply, it may declare that the Convention shall extend to all its territorial units or only to one or more of them.

What is envisaged for giving full effect to the Convention in the United States is a two-tiered body of legislation—both a federally-enacted International Will Act and the Uniform International Wills Act. The latter is to be enacted by each State of the United States either as independent legislation or, in States which have adopted the Uniform Probate Code, as an amendment to the latter. ("State" in this context includes the District of Columbia, the Com-

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monwealth of Puerto Rico and territories of the United States.) The reasons for this proposed two-tiered approach are set forth below.

Article XIV of the Convention is necessary to enable states such as Canada, which has a constitutional apportionment of power between the national government and the provinces/territories different from that between the federal government and the States in the United States, to become a party to the Convention and have it apply only in those provinces or territories that have adopted the uniform law. To date, the Convention is in force in Alberta, Manitoba, Newfoundland, Ontario, and Saskatchewan. An international will that was made, for example, in Belgium, which is a party to the Convention, would be recognized on the basis of the Convention only in those provinces; correspondingly, international wills can be executed by Canadian testators only in those provinces. For the United States, different considerations apply. In view of the international content of the subject matter, there is no constitutional impediment to bringing the Convention into force throughout the United States through use of the treaty power and federal implementing legislation. Thus, ratification of the Convention and adoption of the proposed implementing legislation will entitle an international will originating in a foreign country which has become a party to the Convention to acceptance as an international will in any part of the United States.

It would be undesirable, however, to rely exclusively on federal legislation to bring both aspects of the Convention—the execution of international wills as well as their recognition—into force. Our testators and their attorneys are not accustomed to consulting federal statutes for guidance on the formalities for making wills; they should continue to be able to place primary reliance on the laws of their States, rather than on federal law, for this purpose. What is therefore to be recommended to the Congress and the several State legislatures, is that the making of international wills within the United States be governed by State legislation, with each State free to decide whether it wishes to make it possible for testators to execute wills in its jurisdiction in this new form. To facilitate uniformity in this regard, the National Conference of Commissioners on Uniform State Laws (NCCUSL) prepared the Uniform International Wills Act, which incorporates the rules for making an international will that are contained in the uniform law annexed to the Convention. After the NCCUSL in 1977 approved the Uniform Act and recommended it for enactment in all the States, the House of Delegates of the American Bar Association also endorsed the Act. Four States—California, Minnesota, North Dakota, and Oregon—have already adopted the Uniform International Wills Act. Other States are expected to do so once the Federal government acts to bring the Convention into force for the United States.

To complement this series of State laws and complete the system, federal implementing legislation—the proposed International Will Act—has been drafted and will presently be submitted to the Congress for its consideration. That Act would also contain the rules from the uniform law annexed to the Convention, but it would govern the making of international wills only in those instances where American citizens wish to make a will while abroad and request a United States diplomatic or consular officer to serve as the

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"authorized person." The more important purpose of the federal legislation would be to provide for the recognition of international wills throughout the United States.

Failure of the United States to accept the obligation under the Convention to ensure the recognition of international wills throughout the country as a whole would defeat one of the major purposes of the Convention, which is to enable testators to make a single will which they can be reasonably assured will be accepted as formally valid wherever it may eventually need to be probated. Universal application of this feature of the Convention to wills in the form of international wills emanating from any of our States as well as from foreign countries that adhere to the Convention would reduce the necessity for testators to arrange expensive and possibly misdirected research into the laws of the various jurisdictions which might ultimately be involved. Universal application would also obviate the need for making different wills to comply with the formalities of different jurisdictions or making a new will or codicil when after-acquired property is located in a foreign country or a different State of the United States.

These benefits would accrue to a foreign testator who had assets anywhere in the United States, assuming he made an international will in a country that was a party to the Convention. The same broad protection would be available to American testators. An American residing or sojourning abroad might make an international will (either with the assistance of an American diplomatic or consular officer or, if the foreign country were a party to the Convention, under the law of that country) with assurance that it would be accepted as valid throughout the United States as well as in any other contracting state in which he might have assets at the time of his death. Equally important, an American residing in a State of the United States which had adopted the Uniform International Wills Act could be assured that a single international will made in that State would, on the basis of the Convention and the federal International Will Act, be recognized as formally valid throughout the United States, as well as in all foreign countries party to the Convention.

The experts and the national legal organizations whom the Department has consulted all favor this approach to the implementation in the United States of the obligations established by the Convention. Indeed, this approach has evolved largely in response to the interests of probate lawyers who deal regularly with clients whose affairs may subject their wills to a wide range of variant laws governing the wills in other States and in foreign countries. Hence, the proposal involves a use of federal law to achieve results desired at the State level which cannot be achieved without federal assistance—a will form that, in time, may be valid everywhere. This approach has been endorsed by the Secretary of State's Advisory Committee on Private International Law on which eleven national legal organizations are now represented, and adoption of the draft federal International Will Act has been recommended by the Board of Regents of the American College of Probate Counsel and by the Board of Governors of the American Bar Association.

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Designation of the "Authorized Person"

Given the differing national practices and traditions with regard to the preparation of wills, the framers of the Convention left it to each individual state becoming party to the Convention to decide whom to designate as its "authorized person"—the person who ensures that the formal requirements of the Convention are met and executes and attaches to the will a certificate to that effect. The basis for designating an authorized person whose certification will be broadly recognized is found in the practice in civil law countries where there is already a special category of legally-trained professional persons—notaries (not to be confused with the American notary public)—whose intervention is required in drawing up many private deeds and certain types of wills. Civil law countries are thus likely to designate notaries as the persons authorized to act in connection with international wills. The British Parliament, in preparation for the United Kingdom's ratification of the Convention, has enacted legislation designating both solicitors and notaries public as authorized persons.

The consensus among probate experts in the United States is that, as a matter of both convenience and logic, the function would best be performed in the United States by licensed practicing attorneys. Though not government officials, such attorneys are considered officers of the court; moreover, most wills prepared in the United States—certainly those with significant international aspects—already involve the services of an attorney. Under the Uniform International Wills Act, therefore, all attorneys licensed to practice in the jurisdiction concerned are designated as "authorized persons" to act in connection with the execution of international wills.

Assigning this role to attorneys will make it unnecessary to involve any additional officials in the preparation of international wills in the United States. (As noted above, United States diplomatic and consular agents will be empowered to perform the function of authorized person for wills executed by United States citizens abroad.) There will simply be added to the traditional role of the attorney who prepares a will the obligation to comply with the requirements for an international will and to complete and attach a certificate, in the form prescribed by the Convention and set forth in the applicable statute, to any will which the testator wishes to make acceptable in other jurisdictions as an international will.

Registration of International Will Information

An optional provision which has been included in both the draft federal International Will Act and the Uniform International Wills Act provides for the establishment of central information centers in which authorized persons may register information regarding the execution of international wills.

The Convention itself contains no provisions on this subject. At the conclusion of the 1973 Washington Diplomatic Conference at which the Convention was adopted, however, the Conference also adopted a resolution recommending that parties to the Convention establish internal systems for facilitating the "safekeeping, search and discovery of an international will" and for facilitating the

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international exchange of information concerning the existence of international wills. In some countries, requirements already exist for depositing wills for safekeeping with notaries or other officials. There is much to recommend a system for registering information to ensure fulfillment of the testator's expectation that his international will be discovered and probated upon his death.

Because the establishment of a registry system is not an integral part of the Convention, the details may be reserved for examination by the Congress in connection with its consideration of the proposed International Will Act. In broad outline, the proposal in the draft International Will Act is that the central information center be established in the Department of State; the Uniform International Wills Act leaves it to each State to determine the location of the center for that State. Use of the center would be entirely optional; the authorized person would file information concerning the existence of a will only if the testator wished him to do so. The central information center would receive no information about the content of the will; the authorized person would report only the name and address and other identifying data concerning the testator and the intended place of deposit or safekeeping of the will. The information would be kept in confidence until the death of the testator and would then be made available to persons desiring information about a will who presented satisfactory evidence of the testator's death. If requested by the authorized person, the central information center would transmit the information about execution of an international will to the registry system of another jurisdiction identified by the testator.

Section-by-Section Analysis of the Convention and Annex

The Washington Diplomatic Conference at which the Convention was adopted chose Mr. Jean-Pierre Plantard, Deputy Secretary-General of UNIDROIT, as Rapporteur for the purpose of writing a final report on the Convention. Mr. Plantard's Explanatory Report contains a thorough section-by-section analysis of the Convention and the annexed uniform law. It is customary for UNIDROIT to prepare such reports and distribute them to states that participated at conferences and states adhering to UNIDROIT conventions, and they are widely accepted as a basis for interpretation of such conventions. The availability of such a report is particularly important in view of Article 15 of the uniform law, which provides that "In interpreting and applying the provisions of this law, regard shall be had to its international origin and to the need for uniformity in its interpretation." Mr. Plantard's section-by-section commentary on the Convention and its Annex is submitted as an accompaniment to this message.

Conclusion

Along with the text of the Convention and its Annex and the Plantard Explanatory Report, I enclose for the information of the Senate a copy of the text of the Resolution of the 1973 conference recommending the establishment of a system to facilitate the safekeeping, search and discovery of international wills.

As noted above, ratification of the Convention by the United States and adoption by the Congress of the International Will Act

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enjoy wide support among American probate experts and in the legal profession in general. Resolutions of support have been issued by the Board of Regents of the American College of Probate Counsel and the Board of Governors of the American Bar Association.

As of this date the Convention is in force in Belgium, Canada (in the provinces of Alberta, Manitoba, Newfoundland, Ontario, and Saskatchewan), Cyprus, Ecuador, Libya, Niger, Portugal and Yugoslavia. The United Kingdom has enacted the necessary implementing legislation for the Convention but has not yet determined the date for depositing its instrument of ratification. Given the leading role of the United States in hosting and presiding over the diplomatic conference at which the Convention was adopted, early ratification by the United States will encourage ratification or accession by other countries; ten others, including the United States, have signed but not yet ratified. Ratification will also encourage the States of the United States which have not yet done so to adopt the Uniform International Wills Act, in order to make the full benefits of the Convention available to persons executing will in their jurisdiction.

I recommend, therefore, that you transmit the Convention Providing a Uniform Law on the Form of an International Will to the Senate for its advice and consent to ratification.

Respectfully submitted,

GEORGE P. SHULTZ.

Enclosures:

1. Plantard section-by-section commentary.
2. Resolution on safekeeping adopted by Conference.

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EXPLANATORY REPORT ON THE CONVENTION PROVIDING A UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL

By Mr. Jean-Pierre Plantard, Deputy Secretary-General of the International Institute for the Unification of Private Law (UNIDROIT)

COMMENTARY ON THE ARTICLES OF THE CONVENTION AND OF THE UNIFORM LAW FORMING ITS ANNEX

* The Washington Convention is in the form of a text of 16 articles stating the obligations accepted by Contracting States: the most important of these is to introduce the Uniform Law annexed to the Convention into their respective national legislation. This Uniform Law provides 15 articles governing the form of the international will.

The technique used—Convention and annexed Uniform Law—allows for a high degree of international unification. It has already been used for several international instruments and in particular in the Geneva Conventions of 1930 and 1931 on bills of exchange and cheques and in the Hague Convention of 1964 on international sale.

I. THE CONVENTION

Article I

This article imposes two obligations on Contracting States: the first is essentially that they must introduce into their respective national legislation the rules regarding the international will set out in the Annex to this Convention; the second is that they must submit to the Depositary Government—the United States Government—the text of the rules introduced in order to ensure reciprocal checking and information between the States party to the Convention, as the Depositary Government will then, in accordance with Article XVI (2) (d), give notice of this information to all signatory States.

Paragraph 2 indicates the way in which States must satisfy the first of these two obligations. The text of the Annex is mandatory as it stands in the 4 original languages of the Convention (English, French, Russian, Spanish). It can be translated from these original languages into any official language of the Contracting States. The strict nature of these solutions might seem excessive to some legal draftsmen, especially those who draft in one of the original languages as they cannot make the small changes in the presentation or vocabulary of the Uniform Law that might be justified by the traditions or customs of their drafting technique. The Conference,

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(*) The present report was drawn up in accordance with a decision taken by the Washington Conference in its Final Act. However, it reflects the personal opinions of the author and does not constitute an authoritative instrument of interpretation of the text of the Convention.

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however, preferred to maintain this obligation in its strict form as guaranteeing a more perfect degree of unification. Moreover, it is to be hoped that States with a common official language other than one of the original languages will work towards a common translation, as has already been done once or twice in the past.[1]

The small inconveniences of form that may result from the straightforward introduction of the Uniform Law into national legislation are tempered by two provisions.

One is contained in the Uniform Law itself. Article 15 recalls the international origin of the Law and recommends that this should be taken into account in its interpretation and application. Thus, should the inclusion of certain provisions of the Uniform Law in a particular legal system have an unusual effect, the explanation and justification for this could then be found in the text itself.

There is a further factor which lessens the strict nature of this rule. This is the possibility of adding supplementary provisions stipulated in paragraph 3 of Article I. Such provisions will enable States to introduce the Uniform Law more harmoniously and effectively into legal systems where a straightforward transplantation would prejudice the text's clarity or elegance. This is, however, not the only aim of paragraph 3: it also enables national legislators to add to the actual text of the Uniform Law supplementary measures which are implied, such as the designation of persons authorised to act in connection with international wills or those it suggests or authorises, such as provisions relating to the safekeeping of the international will (see Art. 8 of the Uniform Law and the Resolution adopted by the Diplomatic Conference included as an Annex to the Final Act). Further clarifications may be supplied regarding the choice between the two procedures for signature of the will of a person who either does not know how to or is physically incapable of signing; this choice is left to each Contracting State by Article 5 of the Uniform Law. More generally according to the terms of paragraph 3, States may accompany the Uniform Law by "such further provisions as are necessary" to give "the Uniform Law's provisions full effect in its territory". This would even appear to cover provisions as to the payment of fees, rights or duties which may be demanded when a will is being drawn up. However, it is quite clear that the effect of these provisions could not be to impose added conditions or requirements as to form affecting in any way the validity of an international will.

Finally, it should be noted that the period of six months in which Contracting States may introduce the Uniform Law into their national legislation begins as from the date when the Convention comes into force in respect of the State under consideration. Now, under Article XI, the Convention normally comes into force six months after the instrument of ratification or accession has been deposited. The Contracting State will therefore have altogether one year as from the date of ratification or accession in which to introduce the Uniform Law into its national legislation. This is obviously the maximum time permitted: the Uniform Law will often be introduced simultaneously with ratification of the Convention, in

[1] German-speaking countries have, for instance, prepared a common version of the 1930 and 1931 Uniform Laws on bills of exchange and promissory notes, and cheques.

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some cases by the same statute. It is even possible that the Uniform Law might be introduced into municipal law before the Convention has been ratified.

Article II

Under this article, Contracting States must, at the same time as they introduce the form of the international will into their municipal law, designate the persons authorised to act in this connection. The United States Government is in charge of seeing that this designation is communicated to all the other Contracting States (Article XVI, (e)), which is vital for the validity of duly conferred authorisation to be recognised in all these States (Article III).

Contracting States are given complete discretion in designating the persons authorised to act in connection with international wills. This idea of a person who is authorised to act is in no way unusual in all Civil law countries, for in these countries there is already a special category of professional lawyers, notaries, whose intervention is required, subject to conditions laid down by national law, in drawing up many private deeds and, in particular, for certain types of will. It is, therefore, to be expected that in many countries these notaries will be designated as the persons authorised to act for the purposes of the Washington Convention. However, Contracting States may also designate, instead of or in addition to notaries, if such exist, any other person with the requisite qualification and, if need be, the holders of a position or office, for instance the registrar of a court or a judge, or the holder of an administrative post, a public officer, or the holder of a special office such as the Registry of Wills in Ireland.

In Common law countries where the office of notary, as it is known in Civil law countries, is generally unknown, the designation of persons authorised to act will give rise to certain problems but these ought to be solved without any great difficulty.[2] In England, for instance, solicitors are frequently involved in connection with wills, in particular with their drawing up and safekeeping. In the United States and in other federal states this point may be more delicate and may well lead to somewhat longer lists, but this would not cause any major difficulty.[3]

Article II also expressly stipulates the possibility for States to designate as persons authorised to act their diplomatic and consular agents abroad. This provision seems fully justified as the type of will with which we are concerned was specially intended for persons with a certain international mobility. Nationals of a State that has adopted this possibility may therefore, when in a foreign country—regardless of whether or not it is a Contracting State—use their consulate or embassy in drawing up their international wills. Naturally, this possibility only arises if the State where the consular or diplomatic authorities are resident is not opposed to such duties being given them on its territory. It seems that, in practice, Contracting States which wish to designate their diplomatic and consular agents as persons authorised to act in connec-

[2] See William F. Fratcher, *op. cit.*, pp. 494–495.
[3] See Kurt H. Nadelmann, The Formal Validity of Wills and the Washington Convention 1973 providing the Form of an International Will, 22 *Am. J. Comp. Law* 365, 376–377 (1974).

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tion with international wills will have to do so by using a formula similar to the one in the second sentence of Article II, thus allowing for special agreements—particularly consular conventions—which sometimes contain special provisions on these so-called notarial duties of consuls.

Finally, we should point out that the person designated as being authorised to act may be given other tasks in connection with an international will than those of simply receiving and delivering the certificate stipulated by the Uniform Law. He may, in particular, be requested to ensure the safekeeping of the international will or in some cases to collect certain fees or duties, in connection with what has already been mentioned regarding Article I, paragraph 3.

Article III

The categories of persons authorised will obviously differ from State to State. The only aim of Article III is to express the intention of each Contracting State to recognise the competence as persons authorised to act of all the authorities designated by the national law of the other Contracting States, in accordance with the provisions of Article II. Except in the case of diplomatic or consular agents, authorised persons can, of course, only act within the territory of the State which conferred their authorisation. The phrase "in its territory" in Article II is perfectly clear in this respect. Article III cannot therefore be invoked to enable an authorised person to act outside the territory of his own country: his authorisation is to be recognised in all Contracting States, but his power to act as defined by this authorisation can only be exercised within the limits defined by this authorisation and these cannot overstep the territorial limits of his own country.

Article IV

The certificate made out in three copies by the authorised person is one of the most original aspects of the international will and probably one of its points of major interest.

Its main aim is to furnish proof of the observance of the requirements as to form laid down by the Uniform Law—and, in this way, proof of the validity of the international will itself (see Article 12 of the Uniform Law). Article IV of the Convention ensures the international effectiveness of these means of proof, recognised by all Contracting States. A certificate drawn up in a foreign country by a person authorised according to this foreign country's national law will therefore be just as effective as a national certificate. The inclusion of a model for this certificate in Article 10 of the Uniform Law should remove any doubts as to its contents.

Article V

It did not appear possible to lay down in the Uniform Law unified rules on the conditions requisite to acting as a witness to an international will. The various legal systems contain different provisions on this subject and it would be unrealistic to try to derogate from these for the purposes of a piece of unification limited to the international will. The expression "conditions requisite" does not

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only refer to the general capacity required of witnesses, but also to any special limitation on those persons who may be witnesses—excluding, for example, close relatives or beneficiaries of legacies under the will.

On this point, the Convention, therefore, simply sets out a uniform conflict rule: the conditions requisite are those imposed by the law under which the authorised person was designated. This expression, which is often used in the Convention, indicates a link with what is sometimes called the "lex magistratus" [4], that is to say the law from which the officer acting in connection with the will derives his authority. For the international will, in the light of Article II of the Convention, this will always be the law of the State where the authorised person carries out his business and, therefore, the law of the place where the will was drawn up (lex loci actus)—unless the authorised person is a diplomatic or consular agent, in which case it could only be the law of the State which had sent the respective diplomatic or consular agent on mission.[5] The possibility of authorising diplomatic or consular agents is therefore the only reason why the "lex magistratus" was designated instead of the "lex loci actus". As this is a uniform conflict rule, it could just as easily figure in the Uniform Law as in the Convention.

Paragraph 1 extends the rule for witnesses to interpreters. The Uniform Law does not, however, in any place stipulate the presence of interpreters. Their intervention may, nevertheless, be called for, in particular by the testator himself, to satisfy the requirements of the national law or of local customs which could, if necessary, be included among additional provisions of the Uniform Law, in accordance with Article I, paragraph 3.

Paragraph 2 aims at eliminating certain discriminations which exist and are difficult to justify, especially as regards the international will. In particular, it enables a testator abroad to choose compatriots as witnesses. Nevertheless, this provision is in no way contrary to certain legal systems which require that witnesses must be residents of the place in which they act.

Article VI

Certification of signatures, although required by some country's national legislation, especially for documents drawn up in foreign countries, is often considered a cumbersome and not very effective formality. Following the example of a number of existing bilateral agreements and multilateral conventions [6], the Washington Convention dispenses with this formality, both for signatures appended to the will and for signatures appended to the certificate, as stipulated in Article 9 of the Uniform Law. This provision is in perfect harmony with the rest of the Convention which endeavours to eliminate any discriminations and differences between an international will made in the State where it is invoked and an interna-

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[4] See von Overbreck, *op. cit.*, p. 68.

[5] See Nadelmann, *op. cit.*, p. 372.

[6] The main one of which is the Convention abolishing the requirement of Legalisation for Foreign Public Documents, concluded at The Hague on 5 October 1961 which, as at 15 November 1973, was in force between 19 States.

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tional will made in another State. The words "like formality" refer to any other requirements equivalent to certification but known by another name. This expression is frequently to be found in similar provisions in other Conventions.[7] The addition of the cerificate stipulated by the Convention abolishing the requirement of legalisation for foreign public documents, concluded at The Hague on 5 October 1961, certainly qualifies as a "like formality". Article 3 of this Convention moreover specifies that the addition of this certificate cannot be required if there already exists an agreement dispensing with certification. A certificate could not therefore be required for an international will.

This systematic dispensation with certification does not of course imply that the authenticity of signatures may not be checked when challenged. Paragraph 2 states this clearly, without, however, laying down any procedure for this purpose: the rules applicable in relations between the two States in question should be followed. The expression "the competent authorities" can refer either to administrative or judicial authorities, depending on the circumstances, and indicates that this check should be carried out by official channels, which is logical as what is involved is the checking of a document emanating from a person who received his authority under the law.

Article VII

Article VII lays down another conflict rule, as it was not found possible to establish a uniform system for the safekeeping of international wills. It should be remembered that the Washington Conference adopted a resolution annexed to the Final Act, which, in particular, encourages States to organise a system for the safekeeping, search and discovery of international wills. [8]

The conflict rule that was adopted indicates the "lex magistratus" in the terms and for the reasons already set out above in relation to Article V.

Article VIII

Contracting States are not authorised to make reservations to either the Convention or its Annex. The principle embodied in this provision was criticised at the Diplomatic Conference by some delegations who considered that it interfered with States' sovereignty. However, it was noted that none of the delegations participating in the Conference intended making reservations and, furthermore, that, in consideration of the structure and contents of the Convention, the making of reservations could well ruin the precise purpose of unification, which is the indispensable condition for the general recognition of the international will, in whatever country it may have been made. It was, therefore, considered wise to maintain the prohibition on reservations contained in Article VIII.

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[7] For instance, inter alia, the Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. The Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters talks, in the same way, of "equivalent formality".

[8] See the end of this Report for a commentary of this Recommendation.

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Articles IX-XVI

These Articles form the final clauses which are of a diplomatic nature. They conform for the most part with international practice on this subject and do not, therefore, call for any particular comments. One might, however, stress the liberal scope of Article IX which lays down no limitation or specification as to the States that may sign the Convention. Article XIII contains the traditional clause making it possible for a Contracting State to extend the Convention to the territories that it represents at the international level. This provision was criticised at the Diplomatic Conference but it was maintained in consideration of the fact that, although it concerns increasingly fewer States, it nevertheless continues to have a certain practical usefulness. Special notice should be taken of Articles XIV and XV, intended to provide the adjustments and details required to facilitate adoption of the international will in federal States or States whose territory is composed of different units, for which the Convention offers the additional advantage of internal unification.[9] These so-called "federal" clauses are similar to those contained in the Convention which came out of the 12th session of the Hague Conference on Private International Law in 1972.[10] Article XIV enables a State incorporating two or more legislatures, each with independent legislation on this subject, to ratify the Convention in such a way that it will only apply to those of its territorial units which are in favour of it, whereas those other territorial units which do not wish to benefit from it are left out. A provision of this kind facilitates the ratification of the Convention for federal States. As for Article XV, this simply provides for a reference to the constitutional law of the States in question when it is a question of determining what is meant in the framework of the legal system described above in connection with Article XIV by the terms "internal law" or "the law under which the authorised person has been appointed", terms which are both used in the Convention.

Article XVI lays down a system whereby signatory States are kept informed by the United States Government. The International Institute for the Unification of Private Law is included among those to whom this information must be addressed. It would therefore fit in with the statutory activities of this Organisation for it to give a lead to the movement towards unification begun by this Convention, and to draw conclusions from its efforts in this direction.

II. THE UNIFORM LAW

Article 1

The Uniform Law is intended to be introduced into the legal system of each Contracting State. Article 1, therefore, introduces into the internal law of each Contracting State the new, basic principle according to which the international will is valid irrespective of the country in which it was made, the nationality, domicile or

[9] See Nadelmann, *op. cit.*, pp. 373-374.

[10] See, in particular, Articles 35 and 36 of the Convention concerning the International Administration of the Estates of Deceased Persons

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residence of the testator and the place where the assets forming the estate are located.

The scope of the Uniform Law is thus defined in the first sentence. As was mentioned above, the idea behind it was to establish a new type of will, the form of which would be the same in all countries. The Law obviously does not affect the subsistence of all the other forms of will known under each national law.

The Uniform Law gives no definition of the term will.[11] The preamble of the Convention also uses the expression "last wills". The material contents of the document are of little importance as the Uniform Law governs only its form. There is, therefore, nothing to prevent this form being used to register last wishes that do not involve the naming of an heir and which in some legal systems are called by a special name, such as "Kodizill" in Austrian Law (ABGB § 553).

Although it is given the qualification "international", the will dealt with by the Uniform Law can easily be used for a situation without any international element, for example, by a testator disposing in his own country of his assets, all of which are situated in that same country. The adjective "international", therefore, only indicates what was had in mind at the time when this new will was conceived. Moreover, it would have been practically impossible to define a satisfactory sphere of application, had one intended to restrict its use to certain situations with an international element. Such an element could only be assessed by reference to several factors (nationality, residence, domicile of the testator, place where the will was drawn up, place where the assets are situated) and, moreover, these might vary considerably between when the will was drawn up and the beginning of the inheritance proceedings.

Use of the international will should, therefore, be open to all testators who decide they want to use it. Nothing should prevent it from competing with the traditional forms if it offers advantages of convenience and simplicity over the other forms and guarantees the necessary certainty.

Some of the provisions relating to form laid down by the Uniform Law are considered essential. Violation of these provisions is sanctioned by the invalidity of the will as an international will. These are: that the will must be made in writing, the presence of two witnesses and of the authorised person, signature by the testator and by the persons involved (witnesses and authorised person) and the prohibition of joint wills. The other formalities, such as the position of the signature and date, the delivery and form of the certificate, are laid down for reasons of convenience and uniformity but do not affect the validity of the international will.

Lastly, even when the international will is declared invalid because one of the essential provisions contained in Articles 2 to 5 has not been observed, it is not necessarily deprived of all effect. Paragraph 2 of Article 1 specifies that it may still be valid as a will of another kind, if it conforms with the requirements of the applicable national law. Thus, for example, a will written dated and signed by the testator but handed over to an authorised person in

[11] On this subject see von Overbeck, *op. cit.*, pp. 93–94.

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the absence of witnesses or without the signature of the witnesses and the authorised person could quite easily be considered a valid holograph will. Similarly, an international will produced in the presence of a person who is not duly authorised might be valid as a will witnessed in accordance with Common law rules.

However, in these circumstances, one could no longer speak of an international will and the validity of the document would have to be assessed on the basis of the rules of internal law or of private international law.

Article 2

A joint will cannot be drawn up in the form of an international will. This is the meaning of Article 2 of the Uniform Law which does not give an opinion as to whether this prohibition on joint wills, which exists in many legal systems, is connected with its form or its substance.[12]

A will made in this international form by several people together in the same document would, therefore, be invalid as an international will but could possibly be valid as another kind of will, in accordance with Article 1, paragraph 2 of the Uniform Law.

The terminology used in Article 2 is in harmony with that used in Article 4 of The Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions.

Article 3

Paragraph 1 of Article 3 lays down an essential condition for a will's validity as an international will: it must be made in writing.

The Uniform Law does not explain what is meant by "writing". This is a word of everyday language which, in the opinion of the Law's authors, does not call for any definition but which covers any form of expression made by signs on a durable substance.

Paragraphs 2 and 3 show the very liberal approach of the draft.

Under paragraph 2, the will does not necessarily have to be written by the testator himself. This provision marks a moving away from the holograph will toward the other types of will: the public will or the mystic will and especially the Common law will. The latter, which is often very long, is only in exceptional cases written in the hand of the testator, who is virtually obliged to use a lawyer, in order to use the technical formulae necessary to give effect to his wishes. This is all the more so as wills frequently involve *inter vivos* family arrangements, and fiscal considerations play a very important part in this matter.

This provision also allows for the will of illiterate persons, or persons who, for some other reason, cannot write themselves, for example paralysed or blind persons.

According to paragraph 3, a will may be written in any language. This provision is in contrast with the rules accepted in various countries as regards public wills. It will be noted that the Uniform Law does not even require the will to be written in a language known by the testator. The latter is, therefore, quite free to choose according to whichever suits him best: it is to be expected

[12] See VON OVERBECK, *op. cit.*, pp. 98 to 101.

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that he will usually choose his own language but, if he thinks it is better, he will sometimes also choose the language of the place where the will is drawn up or that of the place where the will is mainly to be carried out. The important point is that he have full knowledge of the contents of his will, as is guaranteed by Articles 4 and 10.

Lastly, a will may be written by hand or by any other method. This provision is the corollary of paragraph 2. What is mainly had in mind is a typewriter, especially in the case of a will drawn up by a lawyer advising the testator.

Article 4

The liberal nature of the principles set out in Article 3 calls for certain guarantees on the other hand. These are provided by the presence of three persons, already referred to in the context of Articles III and V of the Convention, that is to say, the authorised person and the two witnesses. It is evident that these three persons must all be simultaneously present with the testator during the carrying out of the formalities laid down in Articles 4 and 5.

Paragraph 1 of Article 4 requires, first of all, that the testator declare, in the presence of these persons, that the document produced by him is his will and that he knows the contents thereof. The word "declares" covers any unequivocal expression of intention, by way of words as well as by gestures or signs, as, for example, in the case of a testator who is dumb. This declaration must be made on pain of the international will being invalid. This is justified by the fact that the will produced by the testator might have been materially drawn up by a person other than the testator and even, in theory, in a language which is not his own.

Paragraph 2 of the article specifies that this declaration is sufficient: the testator does not need to "inform" the witnesses or the authorised person "of the contents of the will". This rule makes the international will differ from the pubic will and brings it closer to the other types of will: the holograph will and especially the mystic will and the Common law will.

The testator can, of course, always ask for the will to be read, a precaution which can be particularly useful if the testator is unable to read himself. The paragraph under consideration does not in any way prohibit this; it only aims at ensuring respect for secrecy, if the testator should so wish. The international will can therefore be a secret will without being a closed will.

Article 5

The declaration made by the testator under Article 4 is not sufficient: under Article 5, paragraph 1, he must also sign his will. However, the authors of the Uniform Law presumed that, in certain cases, the testator might already have signed the document forming his will before producing it. To require a second signature would be evidence of an exaggerated formalism and a will containing two signatures by the testator would be rather strange. That is why the same paragraph provides that, when he has already signed the will, the testator can merely acknowledge it. This acknowledge-

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ment is completely informal and is normally done by a simple declaration in the presence of the authorised person and witnesses.

The Uniform Law does not explain what is meant by "signature". This is once more a word drawn from everyday language, the meaning of which is usually the same in the various legal systems. The presence of the authorised person, who will necessarily be a practising lawyer will certainly guarantee that there is a genuine signature correctly affixed.

Paragraph 2 was designed to give persons incapable of signing the possibility of making an international will. All they have to do is indicate their incapacity and the reason therefor to the authorised person. The authorised person must then note this declaration on the will which will then be valid, even though it has not been signed by the testator. Indication of the reason for incapacity is an additional guarantee as it can be checked. The certificate drawn up by the authorised person in the form prescribed in Article 10 again reproduces this declaration.

The authors of the Uniform Law were also conscious of the fact that in some legal systems—for example, English law—persons who are incapable of signing can name someone to sign in their place. Although this procedure is completely unknown to other systems in which a signature is exclusively personal, it was accepted that the testator can ask another person to sign in his name, if this is permitted under the law from which the authorised person derives his authority. This amounts to nothing more than giving satisfaction to the practice of certain legal systems, as the authorised person must, in any case, indicate on the will that the testator declared that he could not sign, and give the reason therefor. The indication is sufficient to make the will valid. There will, therefore, simply be a signature affixed by a third person instead of that of the testator. Although there is nothing stipulating this in the Uniform Law, one can expect the authorised person to explain the source of this signature on the document, all the more so as the signature of this substitute for the testator must also appear on the other pages of the will, by virtue of Article 6.

This method, over which there were some differences of opinion at the Diplomatic Conference, should not however interfere in any way with the legal systems which do not admit a signature in the name of someone else. Besides, its use is limited to the legal systems which admit it already and it is now implicitly accepted by the others when they recognise the validity of a foreign document drawn up according to this method. However, this situation can be expected to arise but rarely, as an international will made by a person who is incapable of signing it will certainly be a rare event.

Lastly, Article 5 requires that the witnesses and authorised person also sign the will there and then in the presence of the testator. By using the words, "attest the will by signing", when only the word "sign" had been used when referring to the testator, the authors of the Uniform Law intended to make a distinction between the person acknowledging the contents of a document and those who have only to affix their signature in order to certify their participation and presence.

In conclusion, the international will will normally contain four signatures: that of the testator, that of the authorised person and

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those of the two witnesses. The signature of the testator might be missing: in this case, the will must contain a note made by the authorised person indicating that the testator was incapable of signing, adding his reason. All these signatures and notes must be made on pain of invalidity. Finally, if the signature of the testator is missing, the will could contain the signature of a person designated by the testator to sign in his name, in addition to the abovementioned note made by the authorised person.

Article 6

The provisions of Article 6 and those of the following articles are not imposed on pain of invalidity. They are nevertheless compulsory legal provisions which can involve sanctions, for example, the professional, civil and even criminal liability of the authorised person, according to the provisions of the law from which he derives his authority.

The first paragraph, to guarantee a uniform presentation for international wills, simply indicates that signatures shall be placed at the end of international wills, that is, at the end of the text.

Paragraph 2 provides for the frequent case in which the will consists of several sheets. Each sheet has to be signed by the testator, to guarantee its authenticity and to avoid substitutions. The use of the word "signed" seems to imply that the signature must be in the same form as that at the end of the will. However, in the legal systems which merely require that the individual sheets be paraphed, usually by means of initials, this would certainly have the same value as signature, as a signature itself could simply consist of initials.

The need for a signature on each sheet, for the purpose of authentifying each such sheet, led to the introduction of a special system for the case when the testator is incapable of signing. In this case it will generally be the authorised person who will sign each sheet in his place, unless, in accordance with Article 5, paragraph 2, the testator has designated another person to sign in his name. In this case, it will of course be this person who will sign each sheet.

Lastly, it is prescribed that the sheets shall be numbered. Although no further details are given on this subject, it will in practice be up to the authorised person to check if they have already been numbered and, if not, to number them or ask the testator to do so.

The aim of this provision is obviously to guarantee the orderliness of the document and to avoid losses, subtractions or substitutions.

Article 7

The date is an essential element of the will and its importance is quite clear in the case of successive wills. Paragraph 1 of Article 7 indicates that the date of the will in the case of an international will is the date on which it was signed by the authorised person, this being the last of the formalities prescribed by the Uniform Law on pain of invalidity (Article 5, paragraph 3). It is, therefore,

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from the moment of this signature that the international will is valid.

Paragraph 2 stipulates that the date shall be noted at the end of the will by the authorised person. Although this is compulsory for the authorised person, this formality is not sanctioned by the invalidity of the will which, as is the case in many legal systems such as English, German and Austrian law, remains fully valid even if it is not dated or is wrongly dated. The date will then have to be proved by some other means. It can happen that the will has two dates, that of its drawing up and the date on which it was signed by the authorised person as a result of which it became an international will. Evidently only this last date is to be taken into consideration.

Article 8

During the preparatory work it has been intended to organise the safekeeping of the international will and to entrust its care to the authorised person. This plan caused serious difficulties both for the countries which do not have the notary as he is known in Civil law system and for the countries in which wills must be deposited with a public authority, as is the case, for example, in the Federal Republic of Germany, where wills must be deposited with a court.

The authors of the Uniform Law therefore abandoned the idea of introducing a unified system for the safekeeping of international wills. However, where a legal system already has rules on this subject, these rules of course also apply to the international will as well as to other types of will. Finally, the Washington Conference adopted, at the same time as the Convention, a resolution recommending States, in particular, to organise a system facilitating the safekeeping of international wills (see the commentary on this resolution, at the end of this Report). It should lastly be underlined that States desiring to give testators an additional guarantee as regards the international will will organise its safekeeping by providing, for example, that it shall be deposited with the authorised person or with a public officer. Complementary legislation of this kind could be admitted within the framework of paragraph 3 of Article 1 of the Convention, as was mentioned in our commentary on that article.

These considerations explain why Article 8 starts by stipulating that it only applies "in the absence of any mandatory rule pertaining to the safekeeping of the will". If there happens to be such a rule in the national law from which the authorized person derives his authority this rule shall govern the safekeeping of the will. If there is no such rule, Article 8 requires the authorised person to ask the testator whether he wishes to make a declaration in this regard. In this way, the authors of the Uniform Law sought to reconcile the advantage of exact information so as to facilitate the discovery of the will after the death of the testator, on the one hand, and respect for the secrecy which the testator may want as regards the place where his will is kept, on the other hand. The testator is therefore quite free to make or not to make a declaration in this regard, but his attention is nevertheless drawn to the possibility left open to him, and particularly to the opportunity he has, if he

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expressly asks for it, to have the details he thinks appropriate in this regard mentioned on the certificate provided for in Article 9. It will thus be easier to find the will again at the proper time, by means of the certificate made out in three copies, one of which remains in the hands of the authorised person.

Article 9

This provision specifies that the authorised person must attach to the international will a certificate drawn up in accordance with the form set out in Article 10, establishing that the Uniform Law's provisions have been complied with. The term "joint au testament" means that the certificate must be added to the will, that is, fixed thereto. The English text which uses the word "attach" is perfectly clear on this point. Furthermore, it results from Article 11 that the certificate must be made out in three copies. This document, the contents of which are detailed in Article 10, is proof that the formalities required for the validity of the international will have been complied with. It also reveals the identity of the persons who participated in drawing up the document and may, in addition, contain a declaration by the testator as to the place where he intends his will to be kept. It should be stressed that the certificate is drawn up under the entire responsibility of the authorised person who is the only person to sign it.

Article 10

Article 10 sets out the form for the certificate. The authorised person must abide by it, in accordance with the provisions of Article 10 itself, laying down this or a substantially similar form. This last phrase could not be taken as authorising him to depart from this form: it only serves to allow for small changes of detail which might be useful in the interests of improving its comprehensibility or presentation, for example, the omission of the particulars marked with an asterisk indicating that they are to be completed where appropriate when in fact they do not need to be completed and thus become useless.

Including the form of a certificate in one of the articles of a Uniform Law is unusual. Normally these appear in the annexes to Conventions.[13] However, in this way, the authors of the Uniform Law underlined the importance of the certificate and its contents. Moreover, the Uniform Law already forms the Annex to the Convention itself.

The 14 particulars indicated on the certificate are numbered. These numbers must be reproduced on each certificate, so as to facilitate its reading, especially when the reader speaks a foreign language, as they will help him to find the relevant details more easily: the name of the authorised person and the testator, addresses, etc.

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[13] For example: The Hague Convention Abolishing the Requirement of Legalisation of Foreign Public Documents, concluded on 5 October 1961; the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, concluded on 15 November 1965; the Hague Convention concerning the International Administration of the Estates of Deceased Persons, adopted at the XIIth session of the Hague Conference.

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The certificate contains all the elements necessary for the identification of the authorised person, testator and witnesses. It expressly mentions all the formalities which have to be carried out in accordance with the provisions of the Uniform Law. Furthermore, the certificate contains all the information required for the will's registration according to the system introduced by the Council of Europe Convention on the Establishment of a Scheme of Registration of Wills, signed at Basle on 16 May 1972.

Article 11

The authorised person must keep a copy of the certificate and deliver one to the testator. Seeing that another copy has to be attached to the will in accordance with Article 9, it may be deduced that the authorised person must make out altogether three copies of the certificate. These cannot be simple copies but have to be three signed originals. This provision is useful for a number of reasons. The fact that the testator keeps a copy of the certificate is a useful reminder for him, especially when his will is being kept by the authorised person or deposited with someone designated by national law. Moreover, discovery of the certificate among the testators' papers will inform his heirs of the existence of a will and enable them to find it more easily. The fact that the authorised person keeps a copy of the certificate enables him to inform the heirs as well, if necessary. Lastly, the fact that there are several copies of the certificate is a guarantee against changes being made to one of them and even, to a certain extent, against certain changes to the will itself, for example as regards its date.

Article 12

Article 12 states that the certificate is conclusive of the formal validity of the international will. It is therefore a kind of proof supplied in advance.

This provision is only really understandable in those legal systems, like the United States, where a will can only take effect after it has been subjected to a preliminary procedure of verification ("Probate" ([14])) designed to check on its validity. The mere presentation of the certificate should suffice to satisfy the requirements of this procedure.

However, the certificate is not always irrefutable as proof, as is indicated by the words "in the absence of evidence to the contrary". If it is challenged, then the ensuing litigation will be solved in accordance with the legal procedure applicable in the Contracting State where the will and certificate are presented.

Article 13

The principle set out in Article 13 is already implied by Article 1, as only the provisions of Articles 2 to 5 are prescribed on pain of invalidity. Besides, it is perfectly logical that the absence of or irregularities in a certificate should not affect the formal validity of

[14] See William F. Fratcher, *op. cit.*, Richard W. Wellman, *Recent UNIDROIT Drafts on the International Will*, International Lawyer, 1973, pp. 205–219.

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the will, as the certificate is a document serving essentially for purposes of proof drawn up by the authorised person, without the testator taking any part either in drawing it up or in checking it. This provision is in perfect harmony with Article 12 which by the terms "in the absence of evidence to the contrary" means that one can challenge what is stated in the certificate.

In consideration of the fact that the authorised person will be a practising lawyer officially designated by each Contracting State, it is difficult to imagine him omitting or neglecting to draw up the certificate provided for by the national law to which he is subject. Besides, he would lay himself open to an action based on his professional and civil liability. He could even expose himself to sanctions laid down by his national law.

However, the international will subsists, even if, by some quirk, the certificate which is a means of proof but not necessarily the only one, should be missing, be incomplete or contain particulars which are manifestly erroneous. In these undoubtedly very rare circumstances, proof that the formalities prescribed on pain of invalidity have been carried out will have to be produced in accordance with the legal procedures applicable in each State which has adopted the Uniform Law.

Article 14

The authors of the Uniform Law did not intend to deal with the subject of the revocation of wills. There is indeed no reason why the international will should be submitted to a regime different from that of other kinds of will. Article 14 therefore merely gives expression to this idea. Whether or not there has been revocation—for example, by a subsequent will is to be assessed in accordance with the law of each State which has adopted the Uniform Law, by virtue of Article 14. Besides, this is a question mainly concerning rules of substance which would thus overstep the scope of the Uniform Law.

Article 15

This Article contains a provision which is to be found in a similar form in several conventions or draft Uniform Laws.[15] It seeks to avoid practising lawyers interpreting the Uniform Law solely in terms of the principles of their respective internal law, as this would prejudice the international unification being sought after. It requests judges to take the international character of the Uniform Law into consideration and to work towards elaborating a sort of common case-law, taking account of the foreign legal systems which provided the foundation for the Uniform Law and the decisions handed down on the same text by the courts of other countries. The effort towards unification must not be limited to just bringing about the Law's adoption, but should be carried on into the process of putting it into operation.

[15] See in particular: Article 17 of the draft Uniform Law on International Sale as revised by UNCITRAL; Article 7 of the Convention on Prescription in International Sales of Goods; Article 10 of the draft UNIDROIT Convention on Agency of an International Character in the Sale and Purchase of Goods.

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THE RESOLUTION ADOPTED BY THE CONFERENCE

The Resolution adopted by the Washington Conference and annexed to its Final Act encourages States which adopt the Uniform Law to make additional provisions for the registering and safekeeping of the international will. The authors of the Uniform Law considered that it was not possible to lay down uniform rules on this subject on account of the differences in tradition and outlook, but several times, both during the preparatory work and during the final diplomatic phase, they underlined the importance of States making such provisions.

The Resolution recommends organising a system enabling . . . "the safekeeping, search and discovery of an international will as well as the accompanying certificate" . . .

Indeed lawyers know that many wills are never carried out because the very existence of the will itself remains unknown or because the will is never found or is never produced. It would be quite possible to organise a register or index which would enable one to know after the death of a person whether he had drawn up a will. Some countries have already done something in this field, for example, Quebec, Spain, the Federal Republic of Germany, where this service is connected with the Registry of Births, Marriages and Deaths. Such a system could perfectly well be fashioned so as to ensure respect for the legitimate wish of testators to keep the very existence of their will secret.

The Washington Conference also underlined that there is already an International Convention on this subject, namely the Council of Europe Convention on the Establishment of a Scheme of Registration of Wills, concluded at Basle on 16 May 1972, to which States which are not members of the Council of Europe may accede.[16]

In this Convention the Contracting States simply undertake to create an internal system for registering wills. The Convention stipulates the categories of will which should be registered, in terms which include the international will[17]. Apart from national bodies in charge of registration, the Convention also provides for the designation by each Contracting State of a national body which must remain in contact with the national bodies of other States and communicate registrations and any information asked for. The Convention specifies that registration must remain secret during the life of the testator[18]. This system, which will come into force between a number of European States in the near future, interested the authors of the Convention, even if they do not accede to it. The last paragraph of the Resolution follows the pattern of the Basle Convention by recommending, in the interests of facilitating an international exchange of information on this matter, the designation in each State of authorities or services to handle such exchanges.

As for the organisation of the safekeeping of international wills, the resolution merely underlines the importance of this, without making any specific suggestions in this regard. This problem has

[16] Article 13 of the Convention.
[17] Article 4 of the Convention.
[18] Article 8 of the Convention.

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already been discussed in connection with Article 8 of the Uniform Law.

RESOLUTION

The Conference

Considering the importance of measures to permit the safeguarding of wills and to find them after the death of the testator;

Emphasizing the special interest in such measures with respect to the international will, which is often made by the testator far from his home;

Recommends to the States that participated in the present Conference

--that they establish an internal system, centralized or not, to facilitate the safekeeping, search and discovery of an international will as well as the accompanying certificate, for example, along the lines of the Convention on the Establishment of a Scheme of Registration of Wills concluded at Basel on May 16, 1972;

—that they facilitate the international exchange of information in these matters and, to this effect, that they designate in each state an authority or a service to handle such exchanges.

CONVENTION PROVIDING A UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL

The States signatory to the present Convention,

DESIRING to provide to a greater extent for the respecting of last wills by establishing an additional form of will hereinafter to be called an "international will" which, if employed, would dispense to some extent with the search for the applicable law;

HAVE RESOLVED to conclude a Convention for this purpose and have agreed upon the following provisions:

ARTICLE 1

1. Each Contracting Party undertakes that not later than six months after the date of entry into force of this Convention in respect of that Party it shall introduce into its law the rules regarding an international will set out in the Annex to this Convention.

2. Each Contracting Party may introduce the provisions of the Annex into its law either by reproducing the actual text, or by translating it into its official language or languages.

3. Each Contracting Party may introduce into its law such further provisions as are necessary to give the provisions of the Annex full effect in its territory.

4. Each Contracting Party shall submit to the Depositary Government the text of the rules introduced into its national law in order to implement the provisions of this Convention.

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ARTICLE II

1. Each Contracting Party shall implement the provisions of the Annex in its law, within the period provided for in the preceding article, by designating the persons who, in its territory, shall be authorized to act in connection with international wills. It may also designate as a person authorized to act with regard to its nationals its diplomatic or consular agents abroad insofar as the local law does not prohibit it.

2. The Party shall notify such designation, as well as any modifications thereof, to the Depositary Government.

ARTICLE III

The capacity of the authorized person to act in connection with an international will, if conferred in accordance with the law of a Contracting Party, shall be recognized in the territory of the other Contracting Parties.

ARTICLE IV

The effectiveness of the certificate provided for in Article 10 of the Annex shall be recognized in the territories of all Contracting Parties.

ARTICLE V

1. The conditions requisite to acting as a witness of an international will shall be governed by the law under which the authorized person was designated. The same rule shall apply as regards an interpreter who is called upon to act.

2. Nonetheless no one shall be disqualified to act as a witness of an international will solely because he is an alien.

ARTICLE VI

1. The signature of the testator, of the authorized person, and of the witnesses to an international will, whether on the will or on the certificate, shall be exempt from any legalization or like formality.

2. Nonetheless, the competent authorities of any Contracting Party may, if necessary, satisfy themselves to the authenticity of the signature of the authorized person.

ARTICLE VII

The safekeeping of an international will shall be governed by the law under which the authorized person was designated.

ARTICLE VIII

No reservation shall be admitted to this Convention or to its Annex.

ARTICLE IX

1. The present Convention shall be open for signature at Washington from October 26, 1973, until December 31, 1974.

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2. The Convention shall be subject to ratification.

3. Instruments of ratification shall be deposited with the Government of the United States of America, which shall be the Depositary Government.

ARTICLE X

1. The Convention shall be open indefinitely for accession.

2. Instruments of accession shall be deposited with the Depositary Government.

ARTICLE XI

1. The present Convention shall enter into force six months after the date of deposit of the fifth instrument of ratification or accession with the Depositary Government.

2. In the case of each State which ratifies this Convention or accedes to it after the fifth instrument of ratification or accession has been deposited, this Convention shall enter into force six months after the deposit of its own instrument of ratification or accession.

ARTICLE XII

1. Any Contracting Party may denounce this Convention by written notification to the Depositary Government.

2. Such denunciation shall take effect twelve months from the date on which the Depositary Government has received the notification, but such denunciation shall not affect the validity of any will made during the period that the Convention was in effect for the denouncing State.

ARTICLE XIII

1. Any State may, when it deposits its instrument of ratification or accession or at any time thereafter, declare, by a notice addressed to the Depositary Government, that this Convention shall apply to all or part of the territories for the international relations of which it is responsible.

2. Such declaration shall have effect six months after the date on which the Depositary Government shall have received notice thereof or, if at the end of such period Convention has not yet come into force, from the date of its entry into force.

3. Each Contracting Party which has made a declaration in accordance with paragraph 1 of this Acticle may, in accordance with Article XII, denounce this Convention in relation to all or part of the territories concerned.

ARTICLE XIV

1. If a State has two or more territorial units in which different systems of law apply in relation to matters respecting the form of wills, it may at the time of signature, ratification, or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.

2. These declarations shall be notified to the Depositary Government and shall state expressly the territorial units to which the Convention applies.

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ARTICLE XV

If a Contracting Party has two or more territorial units in which different systems of law apply in relation to matters respecting the form of wills, any reference to the internal law of the place where the will is made or to the law under which the authorized person has been appointed to act in connection with international wills and shall be construed in accordance with the constitutional system of the Party concerned.

ARTICLE XVI

1. The original of the present Convention, in the English, French, Russian and Spanish languages, each version being equally authentic, shall be deposited with the Government of the United States of America, which shall transmit certified copies thereof to each of the signatory and acceding States and to the International Institute for the Unification of Private Law.

2. The depositary Government shall give notice to the signatory and acceding States, and to the International Institute for the Unification of Private Law, of:

(a) any signature;

(b) the deposit of any instrument of ratification or accession;

(c) any date on which this Convention enters into force in accordance with Article XI;

(d) any communication received in accordance with Article I, paragraph 4;

(e) any notice received in accordance with Article II, paragraph 2;

(f) any declaration received in accordance with Article XIII, paragraph 2, and the date on which such declaration takes effect;

(g) any denunciation received in accordance with Article XII, paragraph 1, or Article XIII, paragraph 3, and the date on which the denunication takes effect;

(h) any declaration received in accordance with Article XIV, paragraph 2, and the date on which the declaration takes effect.

In witness whereof, the undersigned Plenipotentiaries, being duly authorized to that effect, have signed the present Convention.

Done at Washington this twenty-sixth day of October, one thousand nine hundred and seventy-three.

* * * * * * *

ANNEX—UNIFORM LAW ON THE FORM OF AN INTERNATIONAL WILL

ARTICLE 1

1. A will shall be valid as regards form, irrespective particularly of the place where it is made, of the location of the assets and of the nationality, domicile or residence of the testator, if it is made in the form of an international will complying with the provisions set out in Articles 2 to 5 hereinafter.

2. The invalidity of the will as an international will shall not affect its formal validity as a will of another kind.

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ARTICLE 2

This law shall not apply to the form of testamentary dispositions made by two or more persons in one instrument.

ARTICLE 3

1. The will shall be made in writing.
2. It need not be written by the testator himself.
3. It may be written in any language, by hand or by any other means.

ARTICLE 4

1. The testator shall declare in the presence of two witnesses and of a person authorized to act in connection with international wills that the document is his will and that he knows the contents thereof.
2. The testator need not inform the witnesses, or the authorized person, of the contents of the will.

ARTICLE 5

1. In the presence of the witnesses and of the authorized person, the testator shall sign the will or, if he has previously signed it, shall acknowledge his signature.
2. When the testator is unable to sign, he shall indicate the reason therefor to the authorized person who shall made note of this on the will. Moreover, the testator may be authorized by the law under which the authorized person was designated to direct another person to sign on his behalf.
3. The witnesses and the authorized person shall there and then attest the will by signing in the presence of the testator.

ARTICLE 6

1. The signatures shall be placed at the end of the will.
2. If the will consists of several sheets, each sheet shall be signed by the testator or, if he is unable to sign, by the person signing on his behalf or, if there is no such person, by the authorized person. In addition, each sheet shall be numbered.

ARTICLE 7

1. The date of the will shall be the date of its signature by the authorized person.
2. This date shall be noted at the end of the will by the authorized person.

ARTICLE 8

In the absence of any mandatory rule pertaining to the safekeeping of the will, the authorized person shall ask the testator whether he wishes to make a declaration concerning the safekeeping of his will. If so and at the express request of the testator the place where he intends to have his will kept shall be mentioned in the certificate provided for in Article 9.

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ARTICLE 9

The authorized person shall attach to the will a certificate in the form prescribed in Article 10 establishing that the obligations of this law have been complied with.

ARTICLE 10

The certificate drawn up by the authorized person shall be in the following form or in a substantially similar form:

CERTIFICATE

(Convention of October 26, 1973)

1. I, ... (name, address and capacity), a person authorized to act in conncection with international wills
2. Certify that on ..... (date) at ..... (place)
3. (testator) .....(name, address, date and place of birth) in my presence and that of the witnesses
4. (a) .....(name, address, date and place of birth)
   (b) .....(name, address, date and place of birth) has declared that the attached document is his will and that he knows the contents thereof.
5. I furthermore certify that:
6. (a) in my presence and in that of the witnesses
   (1) the testator has signed the will or has acknowledged his signature previously affixed.
   [1] (2) following a declaration of the testator stating that he was unable to sign his will for the following reason .....
—I have mentioned this declaration on the will
[1]—The signature has been affixed by ..... (name, address)
7. (b) the witnesses and I have signed the will;
8. [1] (c) each page of the will has been signed by .... and numbered;
9. (d) I have satisfied myself as to the identity of the testator and of the witnesses as designated above;
10. (e) the witnesses met the conditions requisite to act as such according to the law under which I am acting;
11. [1] (f) the testator has requested me to include the following statement concerning the safekeeping of his will:

.....

.....

12. PLACE
13. DATE
14. SIGNATURE and, if necessary, SEAL.

[1] To be completed if appropriate.

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ARTICLE 11

The authorized person shall keep a copy of the certificate and deliver another to the testator.

ARTICLE 12

In the absence of evidence to the contrary, the certificate of the authorized person shall be conclusive of the formal validity of the instrument as a will under this Law.

ARTICLE 13

The absence or irregularity of a certificate shall not affect the formal validity of a will under this Law.

ARTICLE 14

The international will shall be subject to the ordinary rules of revocation of wills.

ARTICLE 15

In interpreting and applying the provisions of this law, regard shall be had to its international origin and to the need for uniformity in its interpretation.

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